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10
11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13

14 DENISE DANIELS and
THE MOODSTERS COMPANY,

15 Plaintiffs,
16

17 vs.

18 THE WALT DISNEY COMPANY;
DISNEY ENTERPRISES, INC.;
19 DISNEY CONSUMER PRODUCTS
AND INTERACTIVE MEDIA INC.;
20 DISNEY INTERACTIVE STUDIOS,
INC.; DISNEY SHOPPING, INC.;
21 PIXAR,

22 Defendants.
23
24
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26
27
28

Case No. 2:17-cv-04527-PSG-SK

**DEFENDANTS' NOTICE OF
MOTION AND MOTION TO
DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT**

**[Request for Judicial Notice filed
concurrently herewith]**

Judge: Hon. Philip S. Gutierrez

Date: January 29, 2018

Time: 1:30 p.m.

Place: Courtroom 6A

Action Filing Date: June 19, 2017

1 TO PLAINTIFFS DENISE DANIELS AND THE MOODSTERS
 2 COMPANY, AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on January 29, 2018, at 1:30 p.m., or as soon
 4 thereafter as the matter may be heard, in Courtroom 6A of this Court, located at 350
 5 West 1st Street, Los Angeles, California 90012-4565, defendants The Walt Disney
 6 Company; Disney Enterprises, Inc.; Disney Consumer Products and Interactive
 7 Media Inc.; Disney Interactive Studios, Inc.; Disney Shopping, Inc.; and Pixar
 8 (collectively, "Defendants") will and hereby do move pursuant to Federal Rule of
 9 Civil Procedure 12(b)(6) for an order dismissing with prejudice the First Amended
 10 Complaint of plaintiffs Denise Daniels and The Moodsters Company ("Plaintiffs")
 11 on the ground that it fails to state any claim upon which relief can be granted.

12 This Motion is made following the conference of counsel pursuant to Central
 13 District Local Civil Rule 7-3, which took place on October 27, 2017. This Motion is
 14 based on the files, records, and proceedings in this action, this Notice, the following
 15 Memorandum of Points and Authorities, Defendants' Request for Judicial Notice
 16 (filed concurrently herewith), the reply memorandum that Defendants intend to file,
 17 the arguments of counsel, and such other matters as may be presented at the hearing
 18 on this Motion or prior to the Court's decision.

19 DATED: November 17, 2017

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1 **I. INTRODUCTION**

2 Although this lawsuit is styled as a copyright infringement case, Plaintiffs are
3 not claiming that there is any copying, or even similarity, between the plot,
4 dialogue, sequence of events, themes, pace, setting, or mood of Disney/Pixar's
5 critically acclaimed motion picture, *Inside Out*, and those of "*The Moodsters*,"
6 Plaintiffs' concept for an educational television show. Instead, Plaintiffs make the
7 incredible claim that the creators of *Inside Out* copied the concept of the film's main
8 characters, but nothing else. There are two fundamental problems with that
9 position—Plaintiffs' characters themselves are not copyrightable and, in any event,
10 the characters in *Inside Out* and *The Moodsters* are not substantially similar.

11 *Inside Out* tells the story of an 11-year-old girl and her anthropomorphized
12 emotions, who work through the challenges faced by the girl and compete for
13 control of her reactions. This was hardly the first depiction of personified emotions
14 by a Hollywood studio, let alone by Disney. Disney's 1943 short *Reason and*
15 *Emotion* depicted a man's mind as the battleground between the personified Reason
16 and Emotion characters. Even earlier, Donald Duck had grappled with an angel and
17 a devil version of himself in the 1938 short *Donald's Better Self*. Plaintiffs'
18 spurious attempt to claim credit for a pre-existing concept used in *Inside Out* is just
19 not plausible.

20 *First*, Plaintiffs have not claimed that *Inside Out* infringed their registered
21 copyrights in *The Moodsters* promotional materials and pilot episode—an implicit
22 concession that the structural and thematic elements of *Inside Out* find no parallel in
23 Plaintiffs' works. Rather, Plaintiffs attempt to rely on a niche of copyright law
24 which, under exceptional circumstances, provides protection for a character
25 independent of the underlying works in which the character appears. The bar is set
26 by the likes of James Bond and Batman—characters whose distinctive attributes
27 have been cemented in the public imagination through well-distributed works over
28 the course of decades—and it is not cleared in this case. Plaintiffs simply are not

entitled to independent copyright protection for the lightly-sketched characters in *The Moodsters* promotional materials and a single pilot episode.

Second, Plaintiffs cannot show the requisite high degree of substantial similarity between protectable elements of *The Moodsters* characters and the *Inside Out* characters. There are an overwhelming number of differences between the two sets of characters, beginning with the visual: the Moodsters are all furry creatures, whereas most of the *Inside Out* characters are humanoids (think Tinker Bell). More fundamentally, none of the asserted similarities between the Moodsters and the *Inside Out* characters is the kind of expression protected by copyright. Plaintiffs cannot claim a monopoly on the idea to anthropomorphize emotions (even if that were an accurate description of *The Moodsters* characters), or on the depiction of the most basic of human emotions. Likewise, Plaintiffs are not the first to associate particular colors with particular emotions. The fact that the typically “sad” Moodster and *Inside Out*’s Sadness are both colored blue, and the typically “angry” Moodster and *Inside Out*’s Anger are both colored red, is attributable to a linguistic and cultural association between these concepts, not copying.

Plaintiffs’ claim for breach of an implied-in-fact contract, purportedly reached when Plaintiffs pitched the idea for *The Moodsters* to Disney affiliates, is also a non-starter. The claim is barred by a two-year statute of limitations and, in any event, Plaintiffs’ publication of *The Moodsters* bible in 2005 and the pilot in 2007 prevented the formation of any implied agreement. The lack of substantial similarity between *The Moodsters* works and *Inside Out* also dooms this claim.

II. BACKGROUND

A. The Moodsters

In November 2005, Plaintiffs published a “bible” for *The Moodsters*, a contemplated “animated TV show for preschoolers.” (First Am. Compl. (“FAC”), Ex. 3 at 69; RJN, Ex. B-2 (copyright registration).) Each of the Moodsters lives in its own house, and “ha[s] extensive family groups.” (FAC, Ex. 3 at 78-79, 70.)

1 According to the *Moodsters* bible, the setting is “a lush backdrop of furry palm
 2 trees, sloping hillsides, brilliant blankets of sunflowers, blazing amber pumpkin
 3 patches, and twinkling rainbow-colored waterfalls.” (*Id.* at 78.) There is a single,
 4 vague reference to this “wondrous world where the Moodsters live” being
 5 “[s]omewhere deep down inside every child.” (*Id.* at 69.)

6 Each of the five main characters—“Zip (happy/optimistic),” “Roary (angry),”
 7 “Olovia (loving),” “Sniff (sad),” and “Shake (scared)” —feels a range of emotions,
 8 but is identifiable by a predominant character trait, not unlike the Seven Dwarfs or
 9 the Care Bears. For instance, the *Moodsters* bible introduces “Zip” as a yellow
 10 Moodster whose “predominating emotion is happy,” but “even Zip needs some help
 11 figuring out his own emotions.” (*Id.* at 71.) The *Moodsters* bible lays out a sample
 12 show idea, where Sniff feels left out when his friends hang out without him; though
 13 he initially thinks he’s sad, it turns out that he is actually “very angry” and “lets his
 14 anger out—big-time.” (*Id.* at 82.)

15 In 2007, Plaintiffs published the pilot episode for *The Moodsters*, including
 16 by posting it to YouTube. (FAC, Ex. 4 (2007 pilot); RJN, Ex. B-1 (2007 copyright
 17 registration); *id.*, Ex. E-1 (archived webpage showing posting of pilot to YouTube in
 18 2007).) All scenes in the pilot are set in a whimsical world with grassy knolls, giant
 19 mushrooms, butterflies, and an “Amoodsment Park.” There is no reference to this
 20 world being literally located within the body of a child. The 2007 pilot uses
 21 different names for the characters than those in the 2005 *Moodsters* bible: Zip,
 22 Roary, Olovia, Sniff, and Shake are now known as Zazz, Rizzi, Oola, Snorf, and
 23 Scootz. The pilot repeatedly confirms that each of the Moodsters feels a range of
 24 emotions: Snorf (née Sniff) is quite happy when he realizes his catching skills are
 25 improving (FAC, Ex. 4 at 4:40), and Scootz (née Shake) overcomes his fears—“I’m
 26 really not afraid anymore! . . . I’m feeling kind of brave!”—both of which are causes
 27 for celebration. (*Id.* at 7:10-7:30.) Rizzi (née Roary) declares at the end of the pilot,
 28 “Hey, I’m not angry anymore, not one bit!” (*Id.* at 20:40.)

1 **B. Inside Out**

2 In May 2014, Pixar released a synopsis about its next feature film, *Inside Out*;
 3 the media took notice of the parallels between *Inside Out* and the premise of
 4 Disney’s 1943 film *Reason and Emotion*. (RJN, Exs. D-6 to D-20; *id.*, Exs. D-148,
 5 D-220 to D-222.) Over the course of the following year, articles frequently
 6 discussed the “distinct color-coded characters” at the heart of the film—Joy, Fear,
 7 Sadness, Disgust, and Anger—referenced as “a crew of anthropomorphized
 8 emotions.” (*Id.*, Exs. D-22, D-24; *see generally, id.*, Exs. D-1 to D-222 (examples of
 9 articles regarding *Inside Out* and its anthropomorphized emotions as characters,
 10 published between March 26, 2014 and June 18, 2015.)

11 *Inside Out*’s general plot points and characters were nicely summarized by a
 12 review in *Variety* in May 2015, after the film was screened at Cannes. (*Id.*, Ex. A
 13 (DVD of *Inside Out*); Ex. D-148.) “‘Inside Out’ takes place almost entirely in
 14 Riley’s head”—an 11-year-old girl—and focuses on “a group of five Emotions
 15 assigned to Headquarters: the place in Riley’s brain where all her thoughts and
 16 feelings originate” which is outfitted with “an instruments panel of what looks like
 17 an air-traffic control tower inside [Riley’s] head.” (*Id.*) Riley’s dominant emotion is
 18 Joy, “a radioactive-yellow gal” who “superficially resembles Disney’s favorite fairy,
 19 Tinkerbell, minus the wings,” and “serves alongside blue Sadness,” “violet Fear,”
 20 “fiery red Anger,” and “green Disgust . . . to manage memories, generate ideas and
 21 otherwise help Riley deal with life’s challenges.” (*Id.*) When Riley’s parents decide
 22 to move across the country, Riley and her Emotions struggle to make new friends
 23 and deal with tensions at home. (*Id.*)

24 Riley’s “[i]ncoming memories are stored in bright glowing orbs, color-coded
 25 according to whatever Emotion was dominant at the time she experienced it. . . .”
 26 (*Id.*) In a pivotal moment in the film, Sadness infects Riley’s core memories—
 27 golden happy memories—causing them to turn a bluish hue. (*Id.*, Ex. A.) Riley’s
 28 mind flushes out Sadness and Joy, and “Riley’s mental state begins to unravel

1 with Fear, Anger and Disgust left in control, unwisely deciding that the best idea is
2 for Riley to run away.” (*Id.*, Ex. D-148.) The film ends with Riley having a more
3 sophisticated understanding of her emotions. (*Id.*)

4 Pete Docter, the writer and director of *Inside Out*, has told the press that he
5 came up with the idea for *Inside Out* when he observed his own daughter “beginning
6 a painful transition to adolescence,” leaving her “natural childhood exuberance”
7 behind. (*Id.*, Ex. D-220.) Curious about what was really going on inside his
8 daughter’s head, Docter pitched an idea for a movie to help him figure that out.
9 (*Id.*) Docter and his team at Pixar worked closely with Dr. Paul Ekman, a pioneer in
10 the study of emotions, and his protégé Dacher Keltner, “to get the ‘science’ of their
11 animated emotions just right.” (*Id.*, Exs. D-218, D-220.) Dr. Ekman subscribed to
12 the dominant theory of emotions, which “posits that certain emotions are universal,
13 evolutionarily determined, and functionally discrete.” (*Id.*, Ex. D-220.) In an NPR
14 article published on June 10, 2015, Docter noted that Dr. Ekman had identified six
15 emotions—“a nice, manageable number of guys to design and write for.” (*Id.*, Ex.
16 D-218.) Anger, fear, sadness, disgust, and joy made the cut; surprise was merged
17 into fear. (*Id.*)

18 An article in *USA Today* published on June 18, 2015, reflecting another
19 interview with Docter, provides some insight on the visual design of the characters.
20 (*Id.*, Ex. D-219.) Joy was created to be “sprite-like and golden,” and was given blue
21 hair to distinguish her from Tinker Bell. (*Id.*) The article stated that “[s]ome
22 character colors were obvious: Sadness is literally blue. She’s shaped like a teardrop
23 and even her hair evokes water.” (*Id.*) Anger was envisioned as a “square brick” in
24 office attire with short fingers “to make it feel like he’s this uncomfortable guy who
25 is always pent-up and ready to explode.” (*Id.*) Fear, with the wide eyes of shock,
26 was a natural amalgam of surprise. Disgust, as an emotion, “evolved from the need
27 to avoid eating poisoned food, which explains . . . Disgust’s green skin.” (*Id.*) Rave
28 reviews and in-depth articles on the *Inside Out* characters followed the film’s United

1 States premiere on June 8, 2015, up through the film’s nationwide release on June
2 19, 2015. (*Id.*, Exs. D-200 to D-219.)

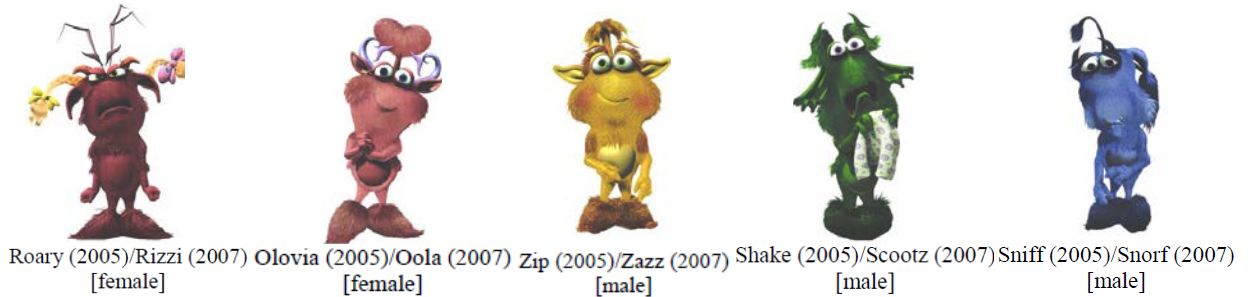
3 **C. Plaintiffs’ Lawsuit**

4 Plaintiff Denise Daniels filed this lawsuit on June 19, 2017, asserting a single
5 claim for breach of implied-in-fact contract. (Dkt. No. 1.) Daniels and another
6 plaintiff, The Moodsters Company, filed an amended complaint on September 20,
7 2017. (FAC, Dkt. No. 27.) The amended complaint continues to assert the implied
8 contract claim, and adds five copyright infringement claims. Plaintiffs do not allege
9 that *Inside Out* infringed either the *Moodsters* bible or the pilot when considered as
10 a whole, but rather contend that *Inside Out* infringed protected elements in Zip/Zazz
11 (“happy”), Sniff/Snorf (“sad”), Roary/Rizzi (“angry”), and Shake/Scootz (“scared”),
12 as well as the collective ensemble of the Moodsters, which encompasses
13 Olovia/Oola (“loving”). Plaintiffs assert that the “expressive elements” of the
14 Moodsters characters include:

15 anthropomorphized single-emotion animated characters that are not human
16 but have traits and characteristics that are not androgynous, and which are
17 not animals or objects, the application of the emotions, including
18 happiness, sadness, anger, and fear as characters; the number of emotions
19 identified as characters (5); the application of a core color for each
20 character; the use of yellow for happiness, blue for sadness, and red for
21 anger; and that these characters reside inside a child.

22 (*Id.* ¶ 146.) In this allegation and throughout the amended complaint, Plaintiffs
23 erroneously contend that each of *The Moodsters* characters is *literally* an
24 anthropomorphized single emotion. There is no acknowledgement that each of the
25 Moodsters actually feels a range of emotions; that the characters react to stimuli
26 experienced in the Moodster world, not external stimuli experienced by a human; or
27 that the *Moodsters* bible describes each character’s predominant trait with an
28 adjective (that is, “happy/optimistic,” “angry,” “loving,” “sad,” “scared”) rather than
defining each character as a single emotion (that is, happiness, anger, love, sadness,
fear). (*Id.* ¶¶ 5, 37, 50, 54-58, 145.)

1 Aside from the color selection for three characters, Plaintiffs do not contend
 2 that there are any visual similarities between *The Moodsters* and *Inside Out*
 3 characters. Nor could they, given the drastic differences in visual appearance
 4 between the two sets of characters (*Id.* ¶¶ 54-58; RJN, Ex. A):



Anger [male]; Disgust [female]; Joy [female]; Fear [male]; Sadness [female]

15 *The Moodsters* are each furry creatures, roughly the same size, with antennae,
 16 tails, and dog-like ears, but not a stitch of clothing (or noses). The *Inside Out* crew
 17 includes three characters who are clearly humanoids (Disgust, Joy, and Sadness)
 18 with human form and facial features, styled hair-dos, and their own fashion
 19 aesthetic. The squat Anger resembles an anthropomorphized brick—dressed for
 20 work in slacks and a tie—and the thin and wiry Fear with bulging eyes resembles an
 21 anthropomorphized bug or nerve ending.

22 Plaintiffs’ implied-in-fact contract claim is based on the allegation that
 23 Daniels or her colleagues pitched the idea for *The Moodsters* to individuals
 24 associated with Disney-affiliated companies from 2005 to 2009, including by
 25 providing them unspecified “materials about *The Moodsters*” in 2005 through 2008.
 26 (FAC ¶¶ 61, 65, 66, 68.) The amended complaint also alleges that Daniels talked to
 27 Doctor on the phone about “the characters, curriculum, and concept underlying *The*
 28 *Moodsters*”; the complaint does not specify the date of this alleged conversation.

(*Id.* ¶¶ 61, 71.)

III. ARGUMENT

A. Plaintiffs' Copyright Infringement Claims Fail.

Plaintiffs do not claim infringement in their copyrighted works as a whole, a tacit concession that there are no similarities in plot, dialogue, mood, theme, setting, sequence of events, or pace—the factors a court typically considers in evaluating substantial similarity between two works. Plaintiffs instead invoke a niche of copyright law that provides independent protection for the rare character who is especially distinctive and widely recognizable. Plaintiffs' characters are not deserving of such exceptional treatment.

Even if the Court were to assume, *arguendo*, that the Moodsters are entitled to copyright protection separate from the copyright in Plaintiffs' registered works, they are not substantially similar to the *Inside Out* characters. A substantial similarity analysis must strip out the unprotectable elements of the characters—the *only* elements that Plaintiffs claim to be similar here. Plaintiffs also ignore the overwhelming differences between the two sets of characters, often the decisive consideration in a substantial similarity analysis.

1. ***The Moodsters* Characters Are Not Independently Copyrightable.**

"Characters are not ordinarily entitled to copyright protection." *Blizzard Entm't, Inc. v. Lilith Games (Shanghai) Co.*, 149 F. Supp. 3d 1167, 1173–74 (N.D. Cal. 2015). The category of characters deserving of copyright protection independent of the other elements in their underlying works consists of those who have achieved notoriety in well-distributed works over the course of decades. The Ninth Circuit's three-part test guides the determination: To be independently copyrightable, a character must (1) have "physical as well as conceptual qualities," (2) "be 'sufficiently delineated' to be recognizable as the same character whenever it appears," and (3) be "'especially distinctive' and 'contain some unique elements of expression.'" *DC Comics v. Towle*, 802 F.3d 1012, 1020–21 (9th Cir. 2015). The

1 Moodsters fail this test whether considered individually or as an ensemble.

2 (a) *The Moodsters Are Not Sufficiently Delineated and Widely*
 3 *Recognizable, Nor Especially Distinctive.*

4 To meet the Ninth Circuit’s test, a “character must be ‘sufficiently delineated’
 5 to be recognizable as the same character whenever it appears. Considering the
 6 character as it has appeared in different productions, it must display consistent,
 7 identifiable character traits and attributes[.]” *Id.* at 1020–21. “[C]ourts have deemed
 8 the *persistence* of a character’s traits and attributes to be key to determining whether
 9 the character qualifies for copyright protection.” *Id.* (emphasis added).

10 A character worthy of independent copyright protection typically has decades
 11 of works on its résumé, demonstrating consistent attributes and qualities which,
 12 given their persistence over the long-haul, are widely recognizable. For instance,
 13 James Bond is one of those exceptional, independently copyrightable characters,
 14 because “[l]ike Rocky, Sherlock Holmes, Tarzan, and Superman, James Bond has
 15 certain character traits that have been developed over time through the sixteen films
 16 in which he appears.” *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F.
 17 Supp. 1287, 1296 (C.D. Cal. 1995). In determining that Batman was independently
 18 deserving of copyright protection, a court detailed Batman’s “63-year crime fighting
 19 career” and noted that “while Batman’s costume and character have evolved over
 20 the years, he has retained unique, protectable characteristics, such as the
 21 iconographic costume elements and his unique life story.” *Sapon v. DC Comics*,
 22 2002 WL 485730, at *3–4 (S.D.N.Y. Mar. 29, 2002); *see also Towle*, 802 F.3d at
 23 1021 (the Batmobile “has maintained distinct physical and conceptual qualities since
 24 its first appearance in the comic books in 1941”). The same is true of Godzilla, who
 25 appeared in 10 films over the decades. *Toho Co. v. William Morrow & Co.*, 33 F.
 26 Supp. 2d 1206, 1215–16 (C.D. Cal. 1998).

27 It strains credulity to argue that *The Moodsters*—characters who appeared
 28 only in promotional materials (the *Moodsters* bible) and a single pilot episode (two
 works in which the characters have different names)—are widely recognizable due

1 to unique and *persistent* traits. The two works asserted by Plaintiffs certainly do not
2 supply the type of baseline needed to determine that each Moodster character is
3 “recognizable as the same character whenever it appears.” *Towle*, 802 F.3d at
4 1020–21. The distribution of the copyrighted versions of *The Moodsters* (the 2005
5 bible and the 2007 pilot episode posted to YouTube) is only a fraction of the
6 distribution of a video which the Ninth Circuit determined could not support
7 independent copyrightability for a character. In *Rice v. Fox Broadcasting Co.*, 330
8 F.3d 1170 (9th Cir. 2003), the Ninth Circuit reasoned that “[c]haracters that have
9 received copyright protection have displayed consistent, widely identifiable traits,”
10 such as Godzilla, James Bond, and Rocky Balboa, and “the magician depicted in
11 [the plaintiff’s] work has appeared in only one home video that sold approximately
12 17,000 copies.” *Id.* at 1175.

13 “In determining whether a character deserves copyright protection, courts
14 look at the many elements of the character—visual depictions, name, dialogue,
15 relationships with other characters, actions and conduct, personality traits, and
16 written descriptions—to determine whether it is sufficiently delineated such that it is
17 a unique expression.” *Fun With Phonics, LLC v. LeapFrog Enterprises, Inc.*, 2010
18 WL 11404474, at *5–6 (C.D. Cal. Sept. 10, 2010) (King, J.). Plaintiffs have not
19 identified any “especially distinctive” traits of the Moodsters that, even if they had
20 been repeated in many successive works, would entitle the characters to independent
21 copyright protection. Plaintiffs rely heavily on visual depictions in asserting that the
22 Moodsters are especially distinctive, but ignore the other elements which must be
23 considered, including the characters’ names (which changed between the two works
24 at issue). *Id.* As for the Moodsters’ “personality traits,” Plaintiffs have not identified
25 any attribute that would distinguish their “scared” character (Shake/Scootz) from
26 any other stock character that felt fearful. The same is true of their
27 “happy/optimistic” character (Zip/Zazz), their “sad” character (Sniff/Snorf), and
28 their “angry” character (Roary/Rizzi). Characters are deemed “not particularly

1 distinctive” when they “fit general, stereotypical categories. . . . Consequently,
 2 these characters are not entitled to copyright protection.” *McCormick v. Sony*
 3 *Pictures Entm’t*, 2009 WL 10672263, at *14 (C.D. Cal. July 20, 2009), *aff’d*, 411 F.
 4 App’x 122 (9th Cir. 2011).

5 The characters in *The Moodsters* are also lightly sketched, not “especially
 6 distinctive” and “sufficiently delineated” characters deserving of copyright
 7 protection. *Towle*, 802 F.3d at 1020–21. We have only short descriptions of the
 8 characters in the *Moodsters* bible, and what can be gleaned from the minimal
 9 dialogue and events in the pilot episode. “[C]haracters that are ‘lightly sketched’
 10 through only short summaries and ‘whatever insight into their characters may be
 11 derived from their dialogue and action’ are not entitled to independent protection.”
 12 *Fun With Phonics*, 2010 WL 11404474, at *5–6.¹

13 (b) *Plaintiffs Cannot Claim Copyright Protection For An*
 14 *Ensemble of Unprotectable Characters.*

15 Plaintiffs assert a claim for infringement of the *ensemble* of the five main
 16 characters in *The Moodsters*, seemingly under the theory that the sum may be
 17 greater than its constituent parts. (FAC ¶¶ 144-46, 163.) Aggregating a collection of
 18 lightly-sketched characters into an ensemble does not afford independent copyright
 19 protection for these characters. The characters could of course be considered as a
 20 factor in the extrinsic test comparing the works as a whole, but Plaintiffs have not
 21 asserted such a claim. *See Olson*, 855 F.2d at 1452–53.

22 **2. *The Moodsters Characters and the Inside Out Characters Are***
 23 ***Not Substantially Similar.***

24 Even if the Moodsters were independently copyrightable, the fact remains that

25 ¹ *See Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988) (same); *Rice*,
 26 330 F.3d at 1175–76 (magician who wore standard magician garb and revealed
 27 magic tricks not protected under copyright); *Jones v. CBS, Inc.*, 733 F. Supp. 748,
 28 753 (S.D.N.Y. 1990) (character in pilot script was “not one of those rare
 copyrightable characters, largely because she [was] too undeveloped in the pilot
 script . . . to be more than a stock character.”).

1 they are not substantially similar to the *Inside Out* characters. “In determining
 2 whether characters are similar, a court looks at the totality of [the characters’]
 3 attributes and traits as well as the extent to which the defendants’ characters capture
 4 the total concept and feel of figures in [the plaintiff’s work].” *Shame on You Prods.,*
 5 *Inc. v. Banks*, 120 F. Supp. 3d 1123, 1163–64 (C.D. Cal. 2015), *aff’d sub nom.* 690
 6 F. App’x 519 (9th Cir. 2017). Courts “must take care to inquire only whether the
 7 protect[a]ble elements, standing alone, are substantially similar,”² and therefore
 8 “must be sure ‘to slice or filter out the unprotectable elements’ that arise from the
 9 embodiment of stock ideas in characters in a work.” *Gallagher v. Lions Gate*
 10 *Entm’t Inc.*, 2015 WL 12481504, at *3, *6–7 (C.D. Cal. Sept. 11, 2015). It is also
 11 important to evaluate the differences between two characters, as noticeable
 12 differences between characters will preclude a finding of substantial similarity. *See*
 13 *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 626 (9th Cir. 2010). Put simply,
 14 “[t]he bar for substantial similarity in a character is set quite high.” *Gallagher*, 2015
 15 WL 12481504, at *7.

16 (a) *Asserted Similarities Between the Characters are Based*
 17 *on Unprotectable Elements, and Must Be Filtered Out.*

18 The alleged similarities between *The Moodsters* characters and the *Inside Out*
 19 characters are not the type of protected expression that could support a finding of
 20 substantial similarity.

21 (i) **Anthropomorphizing Emotions Is Unprotectable.**

22 Plaintiffs assert that “Disney-Pixar would not have enjoyed the extreme
 23 success it has had from *Inside Out* without its use of anthropomorphized emotions
 24 as its main characters,” (FAC ¶ 110), and argue that the anthropomorphization of
 25 emotions as animated characters is itself protected expression. (*Id.* ¶¶ 149-54.) As
 26 discussed, a review of Plaintiffs’ copyrighted works makes clear that the Moodsters
 27 are characters exhibiting a predominant mood or attribute, similar to the Seven

28 ² *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002).

1 Dwarfs, but are not literal anthropomorphized emotions belonging to a human
 2 being. Plaintiffs’ spin on the Moodsters for purposes of maintaining this lawsuit is
 3 akin to describing the Seven Dwarfs as the literal emotions of Snow White—it just
 4 does not hold up to scrutiny. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293,
 5 1295-96 (9th Cir. 1998) (emphasizing that courts “are not required to accept as true
 6 conclusory allegations which are contradicted by documents referred to in the
 7 complaint”). In any event, the idea of anthropomorphizing emotions as animated
 8 characters is not protectable expression.³

9 Other works show that the idea of housing anthropomorphized emotions,
 10 cognition, or personality traits inside a person’s head is not something that Plaintiffs
 11 created. The angel and devil on a person’s shoulder is a well-trodden foil showing
 12 the interaction between a person’s competing emotions or instincts, especially in the
 13 field of animation. (*See, e.g.*, Fig. 1.) “In the context of copyright claims, the Court
 14 may take judicial notice of generic elements of creative works,” including those that
 15 are “generally known and can be verified simply by watching television for any
 16 length of time.” *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1129 (C.D. Cal.
 17 2007). The ubiquity of depicting the battling factions of a character’s conscience
 18 can be verified just by spending a Saturday morning watching cartoons.



Fig. 1

³ *See, e.g., Cory Van Rijn, Inc. v. California Raisin Advisory Bd.*, 697 F. Supp. 1136, 1144 (E.D. Cal. 1987) (holding that the idea of an anthropomorphic raisin is not subject to copyright protection); *Green v. Proctor & Gamble, Inc.*, 709 F. Supp. 418, 421 (S.D.N.Y. 1989) (“the idea of characterizing oral bacteria as humanoid ‘cavity makers’ is hardly protectible”); *Gibson v. CBS, Inc.*, 491 F. Supp. 583, 585 (S.D.N.Y. 1980) (“The attribution to an egg of the qualities normally possessed by human beings is of course an ‘idea’ and no more. The idea alone is not subject to copyright protection.”).

1 The works referenced in the amended complaint, including Disney's *Reason*
 2 *and Emotion* film from 1943 and its *Cranium Command* ride at Epcot, also establish
 3 this. (FAC ¶¶ 149-52.)⁴ Each of the referenced works represents competing aspects
 4 of a person's psyche through characters housed in a human head—the same premise
 5 of the *Inside Out* characters (though not *The Moodsters* characters). In *Reason and*
 6 *Emotion*, Disney represented a man's Emotion as a caveman, and his Reason as a
 7 professorial type, competing for control of the driver's seat and levers in a human
 8 head. (Fig. 2.) The *Cranium Command* ride featured a pilot named Buzzy manning
 9 the cortex of the brain in a command center, a setting evocative of the Headquarters
 10 in *Inside Out*. (Fig. 3.) *Herman's Head* housed four characters personifying
 11 Herman's intellect, fear, compassion, and lust. (Fig. 4.) Likewise, the protagonist
 12 in *My Poison Berry Brain* had five different characters in her head governing her
 13 actions. (Fig. 5.)



Fig. 2

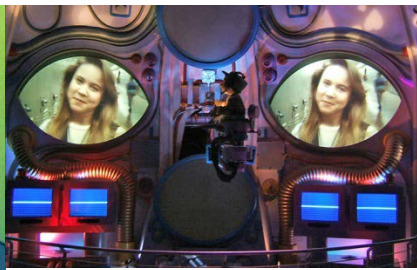


Fig. 3



Fig. 4



Fig. 5

14
 15
 16
 17
 18
 19 “Generalized themes and ideas,” like the idea of representing competing aspects of a
 20 person's psyche or personality as characters residing in the person's head, “lie in the
 21 public domain and are not copyrightable.” *Madrid v. Chronicle Books*, 209 F. Supp.
 22 2d 1227, 1241 (D. Wyo. 2002).⁵

23
 24 ⁴ The Court may take judicial notice of all of the works referenced in the complaint.
 25 *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006) (See FAC
 ¶¶ 149-52; RJN, Exs. C-1 – C-4, D-223.)

26 ⁵ See *Madrid*, 209 F. Supp. 2d at 1241 (“a big, fat, furry monster with horns on its
 27 head, a small, thin child, monsters in children's bedroom closets and vice versa at
 28 night, monsters who are afraid of children—are not original, as they appear in many
 children's stories and are generally known in the public sphere”).

(ii) **The Selection of Core Human Emotions and the Traits Associated with Those Emotions Are Unprotectable.**

Plaintiffs ground their infringement claim, in part, on the selection of a total of five emotions as characters in *Inside Out*, and that four of these emotions are the “same” as those in *The Moodsters*. (FAC ¶¶ 155-58.) Plaintiffs did not “invent” the basic, universal emotions of happiness, fear, anger, and sadness. The presence of these emotions in children transcends cultural boundaries, and is the type of universal truth akin to scientific facts, which are not copyrightable because they are not “created,” they are “discovered” and “are part of the public domain available to every person.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347-48 (1991). Plaintiffs here “fail[] to understand the fundamental difference between idea and expression. Plaintiff[s] would ask this Court to grant [them] a monopoly on unprotected elements, such as themes, emotions, and attitudes on which [cartoons] commonly rely.” *McGee v. Benjamin*, 2012 WL 959377, at *10 (D. Mass. Mar. 20, 2012).

Nor can Plaintiffs claim to have a monopoly on showing a sad character crying, a fearful character quivering, or any other trait that is a standard manifestation of a human emotion. “[B]asic human traits . . . ‘are too general or too common to deserve copyright protection.’” *Marcus v. ABC Signature Studios, Inc.*, 2017 WL 4081885, at *10 (C.D. Cal. Sept. 13, 2017). The “*scenes a faire*” doctrine also excludes from copyright protection material that is “standard,” stock, or common to a particular topic, or that “necessarily follows from a common theme or setting.” *Smart Inventions, Inc. v. Allied Cmcn’s Corp.*, 94 F. Supp. 2d 1060, 1067 (C.D. Cal. 2000) (quoting 4 Nimmer § 13.03[B][4]). Whether under the doctrine of *scenes a faire* or merger, any asserted similarities between the expression of a particular emotion must be filtered out.

(iii) **The Association of Red With Anger, Blue With Sadness, and Yellow With Joy Is Unprotectable.**

Plaintiffs claim copyright protection over “designat[ing] each character with a

1 core color.” (FAC ¶ 159.) They also claim copyright protection over “select[ing]
2 particular colors to correspond with particular emotions,” (*id.* ¶ 160), namely, red
3 for anger, blue for sadness, and yellow for happiness. The idea of associating colors
4 with emotions (including the association of red with anger, blue with sadness, and
5 yellow with happiness) is a linguistic and cultural staple, not an invention of
6 Plaintiffs. Color-coding a character to designate that character’s emotional state is
7 also a common extension of this natural association.

8 The specific association of anger with the color red, as well as elements of
9 heat or fire, is a common trope. The same is true of the connections between blue
10 and sadness, and yellow and happiness. Our language is infused with these
11 associations through metaphorical expressions: An angry person is said to be seeing
12 red, hot-blooded, hot under the collar, red with rage, burning with anger, breathing
13 fire, smoldering, fuming, or have a short fuse. “Blue” is *literally* a synonym for
14 “sad,” and has been since the middle ages. (*See* The Am. Heritage Dictionary of
15 Idioms, at 142 (2d ed.) (“The use of *blue* to mean ‘sad’ dates from the late 1300s.”).)
16 Someone who is sad is also said to have the blues, be feeling blue, or singing the
17 blues. Another metaphorical staple in our language is the association of happiness
18 and sunshine, a yellow glow: A happy person is a ray of sunshine, lights up the
19 room, radiates joy, has a sunny smile, or is beaming. Plaintiffs’ complaint even
20 concedes that red is associated with anger, blue with sadness, and yellow with
21 happiness, but notes that these colors can also be associated with other concepts
22 (such as red and lust, blue and peace, and yellow and cowardice). (FAC ¶ 161.)
23 Plaintiffs therefore recognize that there is a cultural connection between specific
24 colors and specific emotions, and that their own selection of colors for the
25 Moodsters was consistent with convention.

26 Daniels’s original complaint noted that she had previously created a pediatric
27 health care assessment program for Pfizer, which used “color coded symbols and
28 illustrations to express different emotions,” (Compl. ¶ 25), and that she “wanted to

1 expand on her idea of using color-coded illustrations of emotions to help children
 2 with their social and emotional development.” (*Id.* ¶ 27.) However, just as Daniels
 3 was not the first to associate colors with emotions, she was not the first to employ
 4 this device as an educational tool for children or in creating characters. A color-
 5 coded “Wheel of Emotions” was created by Robert Plutchik in 1980—it associates
 6 yellow with joy, blue with sadness, and red with anger. (Fig. 6; *see* Plutchik, R.,
 7 “The Nature of Emotions,” *American Scientist* (July 16, 2001) at Fig. 6.)⁶ A similar
 8 palette of colors, titled “The Color of Feelings,” was copyrighted in 2001 by Jim
 9 Velez. (Fig. 7, *available at* <http://feelingsunlimited.com/feelingspalette>; Reg. No.
 10 VAu00054440.) Color-coding emotions has also been deployed in many
 11 educational and therapeutic aids for children as a means to help them label their
 12 feelings. The “Feelings Frogs” are color-coded bean-bag frogs, each labeled with a
 13 specific emotion (including yellow for happy, blue for sad, and red for angry). (Fig.
 14 8.) The children’s book “Glad Monster, Sad Monster: A Book About Feelings,”
 15 featuring on its cover a yellow monster with a smile and a blue monster with a
 16 frown, was first published in 1997. (Fig. 9.)⁷ The second edition of “Feelings
 17 Book,” which helps children identify feelings and associates emotions with colors
 18 (including yellow for happy, blue for sad, and red for mad), was published in 2002.
 19 (Fig. 10.)⁸



Fig. 6



Fig. 7



Fig. 8



Fig. 9

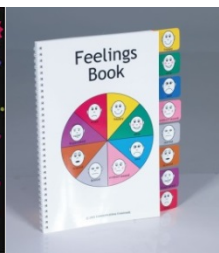


Fig. 10

⁶ See RJN, Ex. E-8 (archived webpage from *American Scientist*). Also available at https://en.wikipedia.org/wiki/Contrasting_and_categorization_of_emotions#Plutchik.27s_wheel_of_emotions.

⁷ <https://www.amazon.com/Glad-Monster-Sad-Ed-Emberley/dp/0316573957>.

⁸ <https://www.amazon.com/Feelings-Book-Emily-Rubin/dp/0974934305>.

1 The association of colors with emotions is also a common trope in visual
 2 creative works—so much so, that there is an entire entry on the trope of “Colour-
 3 Coded Emotions” at tvtropes.org.⁹ And, consistent with the cultural association
 4 between anger and the color red and heat, cartoons routinely demonstrate a
 5 character’s emotional reaction of anger by having the character turn red, and even
 6 burst into flames. (*See, e.g.,* Fig. 11.)



Fig. 11

10 “The Court may take judicial notice of generic elements of creative works,” which
 11 also includes the color-emotion pairings that Plaintiffs utilized in *The Moodsters*.
 12 *Zella*, 529 F. Supp. 2d at 1129; *see also Weiss v. DreamWorks SKG*, 2015 WL
 13 12711658, at *3-4 (C.D. Cal. Feb. 9, 2015) (taking “judicial notice of the fact that
 14 Marilyn Monroe is frequently the subject of creative works,” which “one simply has
 15 to watch television or movies or read books to know”).

16 Plaintiffs’ asserted similarities between *The Moodsters* and *Inside Out*
 17 characters do not clear “[t]he bar for substantial similarity in a character [which] is
 18 set quite high.” *Sheldon Abend Revocable Tr. v. Spielberg*, 748 F. Supp. 2d 200,
 19 208–09 (S.D.N.Y. 2010). In *Hogan v. DC Comics*, 48 F. Supp. 2d 298 (S.D.N.Y.
 20 1999), for instance, “the two main characters were both half-human, half-vampires
 21 named Nicholas Gaunt; both were young white males with pale skin, a medium
 22 build, dark, tired eyes, and dark, scraggly hair; both sought to learn the truth about
 23 their origins; both learned about their origins through flashbacks or memories; both
 24 faced the choice of pursuing good or evil; and both were indoctrinated into the
 25 forces of evil. The *Hogan* Court nonetheless found that the two Nicholas Gaunts
 26 were not substantially similar because the similarities were among ‘unprotectable

⁹ <http://tvtropes.org/pmwiki/pmwiki.php/Main/ColourCodedEmotions>.

1 ideas and themes that do not represent any original elements of plaintiffs' work.'" *Id.* at 310. The same result is compelled here.

3 (b) *Differences Between the Characters Also Precludes a*
4 *Finding of Substantial Similarity.*

5 Plaintiffs' claim of substantial similarity also fails on account of the many
6 differences between *The Moodsters* and *Inside Out*. *See, e.g., Benay*, 607 F.3d at
7 626–27 (finding that differences between two characters' traits including marital
8 status, job, dreams/nightmares, and ideology prevented a finding of substantial
9 similarity).

10 Here, differences can be found even in the elements that Plaintiffs assert as
11 infringed. *Inside Out*'s ensemble of characters includes a green-skinned Disgust,
12 not present in *The Moodsters* character line-up, and likewise *The Moodsters*
13 ensemble includes a pink-furred Olovia/Oola (the "loving" character) without an
14 analogue from the *Inside Out* characters. And while *Inside Out*'s Fear is purple,
15 Plaintiffs' Shake/Scootz (the "scared" character) is green. Three of the *Inside Out*
16 characters are humanoids with human features, skin, and hair, whereas all of the
17 Moodsters appear to be some species of furry alien animal with antennae and tails.
18 Nor do the brick-like Anger or bug-like Fear approximate any visual depiction of
19 the Moodsters. The *Inside Out* characters all wear clothes, in their own personal
20 style; *The Moodsters* characters are au naturel. Whereas the Moodsters all have
21 tiny, childlike voices, the *Inside Out* characters have distinct, adult vocal patterns
22 and pitches.

23 Plaintiffs point out that the *Inside Out* characters are not androgynous,
24 claiming that as a point of similarity. While it is debatable whether *The Moodsters*
25 pilot communicates a gender for each Moodster, the *Moodsters* bible does explicitly
26 assign genders—most of which are the opposite of those in *Inside Out*. (Zip/Zazz is
27 supposedly male; Joy is female. Roary/Rizzi is female; Anger is male. Sniff/Snorf
28 is male; Sadness is female.) And in terms of the more granular analysis of dialogue
and relationships with other characters (including, of course, the *Inside Out*

1 characters' relationship with Riley, the 11-year-old girl whom they are steering)
 2 there are no comparisons to be made between the works.

3 In light of the unprotectable superficial similarities between the characters,
 4 and the overwhelming differences, Plaintiffs fall short of the very high bar for
 5 legally actionable substantial similarity in this context.

6 **B. Plaintiffs' Breach of Implied-in-Fact Contract Claim Fails as a**
 7 **Matter of Law.**

8 Plaintiffs' breach of implied-in-fact contract claim alleges that Defendants
 9 used Plaintiffs' ideas from *The Moodsters* in creating *Inside Out* without
 10 compensating Plaintiffs for the use. (FAC ¶¶ 112–121.) This claim is a non-starter
 11 as a matter of law. First, the claim is clearly barred by a two-year statute of
 12 limitations. Second, Plaintiffs' unconditional disclosure of the *Moodsters* bible in
 13 2005 and the pilot in 2007 precluded the formation of any purported implied-in-fact
 14 contract, given that the consideration of such a contract—an undisclosed idea—was
 15 destroyed. And Plaintiffs do not even attempt to show substantial similarity
 16 between *The Moodsters* and *Inside Out* from a holistic perspective, as required in
 the context of an implied-in-fact contract claim.

17 **1. The Implied-in-Fact Contract Claim Is Time-Barred.**

18 The limitations period to bring a claim for breach of an implied-in-fact
 19 contract is two years, measured from the point that the defendant breaches the
 20 implied promise to pay for use of the plaintiff's idea by disclosing the idea to a
 21 "substantial segment of the public" Cal. Civ. Proc. § 339(1); *Thompson v. Cal.*
 22 *Brewing Co.*, 191 Cal. App. 2d 506, 510 (1961). In *Thompson*, for instance, the
 23 California Court of Appeals held that extensive "test" advertising in San Diego and
 24 Sacramento using the plaintiff's claimed idea started the running of the statute of
 25 limitations because it "immediately disclosed the idea to a substantial segment of the
 26 public," which "would certainly destroy any further marketability of the idea."
 27 *Thompson*, 191 Cal. App. 2d at 510. The claim accrues and the statute of limitations
 28 begins to run at that point, regardless whether the plaintiff is aware of the disclosure,

1 given that “a cause of action for breach of contract ordinarily accrues at the time of
 2 breach even though the injured party is unaware of his right to sue.” *Donahue v.*
 3 *United Artists Corp.*, 2 Cal. App. 3d 794, 801–02 (1969) (rejecting argument that
 4 plaintiff must be aware of defendant’s use of the idea for the limitations period on
 5 implied contract claim to begin to run).¹⁰

6 Here, Plaintiffs allege that “Disney-Pixar released *Inside Out* in the United
 7 States on June 19, 2015”—exactly 2 years before their original complaint was filed.
 8 However, the film premiered internationally at the Cannes Film Festival on May 18,
 9 2015, generating buzz in the media and articles describing and picturing the color-
 10 coded anthropomorphized emotions at the heart of the film. (RJN, Exs. D-116, D-
 11 118 to D-126, D-129 to D-138.) *Inside Out*’s United States premiere occurred on
 12 June 8, 2015 to much fanfare and media attention, resulting in yet more articles
 13 discussing the movie and its characters. (See RJN, Exs. D-200 to D-219.)¹¹ And
 14 long before that point, beginning in March of 2014 (more than 3 years before this
 15 lawsuit was filed), articles about the movie made abundantly clear that each of
 16 *Inside Out*’s five main characters was, in the words of Plaintiffs, “an
 17 anthropomorphic, color-coded animated character representing a single emotion”
 18 (FAC ¶ 85) who lived in the mind of an 11-year-old girl. (RJN, Exs. D-1 to D-222.)

19 This slew of news articles, published in widely distributed periodicals like the
 20 *New York Times*, *USA Today*, the *Los Angeles Times*, *Variety*—even the *Star*
 21 *Tribune*, the local newspaper in Plaintiffs’ hometown—disclosed Defendants’
 22

23 ¹⁰ See also *Pearl v. Deitch*, 2009 WL 1040302, at *5 (Cal. Ct. App. Apr. 20, 2009)
 24 (“Pearl’s contract claims accrued regardless of whether he was cognizant of them,”
 25 as the claim accrues at breach even if plaintiff is unaware of the right to sue; citing
 26 *Donahue*); 3 Witkin, Cal. Procedure, 5th Actions, § 520 (5th ed. 2008) (“a cause of
 27 action for breach of contract ordinarily accrues at the time of breach, and the statute
 28 begins to run at that time regardless of whether any damage is apparent.”).

¹¹ The release dates for *Inside Out*, beginning with the Cannes Film Festival on May
 18, 2015, are available at <http://www.imdb.com/title/tt2096673/releaseinfo>.

1 alleged use of Plaintiffs’ ideas to the broad public more than two years before
 2 Plaintiffs filed this lawsuit.¹² This disclosure to a “substantial segment of the
 3 public” “destroy[ed] further marketability” of the idea for Plaintiffs and triggered
 4 the statute of limitations.

5 Many articles discussed and circulated the trailers for *Inside Out*, which also
 6 highlighted the very aspects of the *Inside Out* characters that Plaintiffs contend
 7 constituted use of their idea. The trailers, which were posted on YouTube and
 8 available to anyone with an internet connection starting in December 2014, would
 9 be sufficient standing alone to trigger the statute of limitations in this case. *J.C. ex*
 10 *rel R.C. v. Beverly Hills Unified School Dist.*, 711 F. Supp. 2d 1094, 1098 (C.D. Cal.
 11 2010) (“YouTube is a publicly-available website where persons can post video clips
 12 for viewing by the general public.”). The first trailer, posted to YouTube on
 13 December 12, 2014, featured each of the five color-coded emotions inside Riley’s
 14 mind. (RJN, Ex. E-5.) As of June 18, 2015, more than two years before Plaintiffs
 15 filed the original complaint, the trailer had been viewed almost 4 million times. (*Id.*)
 16 The second trailer, posted to YouTube on March 10, 2015, also introduced each of
 17 the five characters by name; it had been viewed over 4.5 million times as of June 18,
 18 2015. (*Id.*, Ex. E-6.)

19 In sum, Defendants’ use of Plaintiffs’ alleged idea of color-coded
 20 anthropomorphized emotions was disclosed to a “substantial segment of the public”
 21 without compensation to Plaintiffs more than two years before they filed suit,
 22 rendering their implied contract claim time-barred.

23 **2. Plaintiffs’ Voluntary, Unconditional Publication of *The*** 24 ***Moodsters* Bible and Pilot Prevented the Formation of an** **Implied-in-Fact Contract.**

25 The California Supreme Court has acknowledged that “[t]he general rule of
 26 law is that the noblest of human productions—knowledge, truths ascertained,
 27

28 ¹² FAC ¶¶ 12-13; RJN, Exs. D-98, D-154, D-213, D-214 (articles in *Star Tribune*).

1 conceptions, and ideas—become, after voluntary communication to others, free as
 2 the air to common use.” *Desny v. Wilder*, 46 Cal. 2d 715, 731–732 (1956). By
 3 voluntarily publishing the *Moodsters* bible and the pilot, Plaintiffs destroyed any
 4 potential consideration for the formation of an implied-in-fact contract, providing
 5 another basis for dismissal of this claim.

6 Plaintiffs’ registration with the Copyright Office for the 2005 version of the
 7 *Moodsters* bible (Reg. No. TX 8-389-829, FAC ¶ 132), asserts that the “date of
 8 publication” of the *Moodsters* bible was November 8, 2005. (RJN, Ex. B-2.)

9 Plaintiffs’ copyright registration for the pilot episode of *The Moodsters* (Reg. No.
 10 PA 1-394-057, FAC ¶ 131), asserts that the “date of publication” of the pilot was
 11 June 1, 2007. (RJN, Ex. B-1.) This is consistent with archival records showing the
 12 posting of the pilot to YouTube on *The Moodsters*’ webpage in 2007. (*Id.*, Ex. E-1
 13 (“Our pilot episode, ‘The Amoodsment Mixup’ was completed this summer. We
 14 would appreciate as much feedback as we can get!!!!”; showing 1,087 views of the
 15 pilot as of December 9, 2007); Ex. E-7 (1,147 views as of March 16, 2008).)¹³

16 “Publication” has a defined meaning within copyright law: it is “the distribution of
 17 copies or phonorecords of a work to the public by sale or other transfer of
 18 ownership, or by rental, lease, or lending,” as well as “offering to distribute copies
 19 or phonorecords to a group of persons for purposes of further distribution” 17
 20 U.S.C. § 101. The legislative history explains that “a work is ‘published’ if one or
 21 more copies or phonorecords embodying [the work] are distributed to the public”
 22 with “no explicit or implicit restrictions with respect to [the] disclosure of [the]
 23 contents” of that work. H.R. Rep. No. 94-1476 at 138 (1976).

24
 25 ¹³ This Court may take judicial notice of content contained in archived webpages,
 26 because “the contents of web pages available through the Wayback Machine are
 27 facts that can be accurately and readily determined from sources whose accuracy
 28 cannot reasonably be questioned.” *UL LLC v. Space Chariot, Inc.*, 250 F. Supp. 3d
 596, 604 n.2 (C.D. Cal. 2017).

1 Plaintiffs' publication of the *Moodsters* bible in 2005, and the pilot episode of
2 *The Moodsters* in 2007, with "no explicit or implicit restrictions" with respect to the
3 disclosure of the contents of these works, dooms their implied-in-fact contract
4 claim. The "touchstone" of a *Desny* claim is "whether the plaintiff can be said to be
5 disclosing something that is not otherwise freely available to the defendant. Indeed,
6 it is the *disclosure* of ideas, not protectable under copyright law, but of potential
7 value to the defendants, that serves as the consideration for the implied promise to
8 pay." *Quirk v. Sony Pictures Entm't, Inc.*, 2013 WL 1345075, at *12 (N.D. Cal.
9 Apr. 2, 2013) (emphasis added). The court's decision in *Quirk* illustrates this
10 principle. In that case, the plaintiff asserted a breach of implied-in-fact contract
11 claim alleging that the defendants failed to compensate him for the adaptation of his
12 novel in making a motion picture. *Id.* at *11. The district court dismissed the claim
13 at the pleadings stage, stating that "regardless of the precise circumstances"
14 surrounding the defendant's acquisition of the plaintiff's ideas, the plaintiff's
15 "voluntary wide public distribution of [his] ideas years before defendants ever began
16 working on their movie" doomed the claim. *Id.* Citing *Desny*, the district court held
17 that the plaintiff's publication of the novel was an "unconditioned disclosure" of all
18 of his ideas, and that after the unconditional disclosure, no implied promise to pay
19 for freely available ideas could be implied. *Id.* at *11–12.¹⁴

20 Here, Plaintiffs' copyright registrations and archived webpages establish that
21 Plaintiffs made unconditional disclosures of their ideas through publication of the
22 *Moodsters* bible in 2005, and the pilot in 2007. After that point, the ideas embodied
23 in these works were "freely available," and no obligation to pay may be implied.
24 *See Quirk*, 2013 WL 1345075, at *11–12; *Desny*, 46 Cal. 2d at 739.

25 _____
26 ¹⁴ *See also Faris v. Enberg*, 97 Cal. App. 3d 309, 318–19 (1979) (implied-in-fact
27 contract claim dismissed where plaintiff unconditionally disclosed his idea to
28 defendants); *Grosso v. Miramax Film Corp.*, 2007 WL 2585053, at *7 (Cal. Ct.
App. Sept. 10, 2007) (same).

1 **3. *The Moodsters and Inside Out Are Not Substantially Similar.***

2 To prevail on a claim for breach of implied-in-fact contract, a plaintiff must
3 also show “substantial similarity between plaintiff’s idea and defendant’s
4 production.” *Benay*, 607 F.3d at 631. In deciding whether two works are
5 substantially similar, courts analyze similarities between creative elements such as
6 “plot, motivation, subject matter, milieu, and characterization.” *Henried v. Four*
7 *Star Television*, 266 Cal. App. 2d 435, 436 (1968); *see also Minniear v. Tors*, 266
8 Cal. App. 2d 495, 505 (1968) (comparing “basic plot ideas, themes, sequences and
9 dramatic gimmicks”); *Kightlinger v. White*, 2009 WL 4022193, at *3–8 (Cal. Ct.
10 App. Nov. 23, 2009) (comparing subject matter, themes, sequence of events, plot,
11 milieu, characters, and motivation). Courts routinely reject implied-in-fact contract
12 claims where plaintiffs are unable to show substantial similarity across the range of
13 the elements being compared.¹⁵ Here, Plaintiffs fail to allege *any* similarities across
14 plot, themes, sequences, motivation, subject matter, milieu, dramatic gimmicks, or
15 any other element apart from the characters. As Plaintiffs effectively concede, *The*
16 *Moodsters* and *Inside Out* are not substantially similar; without use of Plaintiffs’
17 idea, there is no basis for the asserted breach of implied contract claim.

18 **IV. CONCLUSION**

19 For the foregoing reasons, Defendants request this Court dismiss each of
20 Plaintiffs’ claims with prejudice.

21 DATED: November 17, 2017

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26
27 ¹⁵ *See, e.g., Henried*, 266 Cal. App. 2d at 436; *Kightlinger*, 2009 WL 4022193, at
28 *9; *Sutton v. Walt Disney Prods.*, 118 Cal. App. 2d 598, 603–04 (1953).